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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

IRWIN SCHIFF,	)	Civil Case No. 09-CV-01274
	)	Criminal Case 2:04-CR-00119-1- KJD
Petitioner,	)	
	)	GOVERNMENT’S MOTION TO DISMISS
v.	)	PETITIONER’S MOTION TO VACATE,
	)	SET ASIDE, OR CORRECT SENTENCE
UNITED STATES OF AMERICA,	)	PURSUANT TO 28 U.S.C. § 2255
	)	
Respondent.	)	

The UNITED STATES OF AMERICA, by and through its counsel, Christopher S. Strauss and Lori A. Hendrickson, Trial Attorneys, Tax Division, Department of Justice, respectfully request that this Court dismiss Petitioner’s motion to vacate, set aside, or correct his sentence pursuant to Title 28, United States Code, Section 2255 (Docket No. 583). The Government’s Motion to Dismiss is based upon the attached memorandum of points and authorities, the Court’s files and records of this case, and any such argument or evidence that may be presented at a hearing (if the Court deems a hearing necessary).

INTRODUCTION

The Government moves to dismiss Petitioner Irwin Schiff’s (“Petitioner” or “Schiff”) motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence of 151 months in custody, to be followed by three years of supervised release, resulting from his conviction for violations of Title 18, United States Code, Section 371; and Title 26, United States Code, Sections 7201, 7206(1), and 7206(2). In his motion, Petitioner presents three grounds for relief including: ineffective assistance of appellate

1 counsel, error by the trial court in allowing Petitioner to proceed pro se, and clerical error in the  
2 calculation of Petitioner's sentence. There is no need to address the merits of Petitioner's claim because  
3 he has an appeal of his criminal convictions pending before the United States Court of Appeals for the  
4 Ninth Circuit (08-10408). Accordingly, the Court should dismiss his 2255 motion at this time.

5 STATEMENT OF THE CASE

6 On March 24, 2004, Petitioner was indicted, along with Cynthia Neun and Lawrence Cohen, for  
7 the following crimes: Count 1, conspiracy to defraud the United States, in violation of Title 18, United  
8 States Code (U.S.C.), Section 371; Counts 2 through 6, aiding and assisting in the filing of false federal  
9 income tax returns, in violation of Title 26, U.S.C., Section 7206(2); Count 17, attempting to evade and  
10 defeat payment of tax, in violation of Title 26, U.S.C., Section 7201, and Counts 18 through 23, filing  
11 false federal income tax returns, in violation of Title 26 U.S.C., Section 7206(1).

12 On September 7, 2004, Petitioner filed notice that he may offer expert testimony relating to his  
13 bipolar disorder. (Docket No. 56.) Co-defendant Cohen similarly filed notice on June 15, 2005, that  
14 he intended to offer expert testimony relating to his narcissistic personality disorder. (Docket No. 152)  
15 The Government moved to exclude evidence regarding the mental disorders of both Petitioner and  
16 Cohen. (Docket No. 162). Cohen filed a response in opposition to the Government's motion to exclude.  
17 (Docket No. 165.) On September 9, 2005, the Court granted the Government's motion to exclude this  
18 evidence. (Docket No. 225.)

19 On September 12, 2005, Petitioner's jury trial began. (Docket No. 244.) On October 24, 2005,  
20 following a twenty-four day trial, the jury found Petitioner guilty of Counts 1 through 6, and Counts 17  
21 through 23. (Docket No. 286.)

22 On February 24, 2006, Petitioner was sentenced to a total of 151 months imprisonment, to be  
23 followed by three years supervised release for his conspiracy and tax fraud convictions. Petitioner had  
24 also been convicted and sentenced during his trial to fifteen counts of Contempt of Court. At the  
25 February 24, 2006 sentencing, the Court remitted the punishments for some of the contempt convictions  
26 and determined that the total term of imprisonment for the contempt convictions should be twelve  
27 months, to run consecutively to the 151 months. Petitioner was also ordered to pay restitution in the  
28 amount of \$4,265,249.78. (Docket No. 390.)

On March 1, 2006, Petitioner filed a Notice of Appeal.<sup>1/</sup> (Docket No. 384.) Petitioner filed his opening brief with the United States Court of Appeals for the Ninth Circuit on March 23, 2007, which the Government answered on June 14, 2007. (Court of Appeals Docket No. 06-10199.) On December 26, 2007, the Ninth Circuit affirmed Petitioner's conspiracy and tax fraud convictions, and his resulting 151-month sentence. See United States v. Cohen, No. 06-10199, 2007 U.S. App. LEXIS 30028, at \*3 (9th Cir. Dec. 26, 2007). However, in a separate opinion, the Ninth Circuit vacated Petitioner's contempt convictions due to the district court's failure to file contempt orders for each of those convictions as required by Federal Rule of Criminal Procedure 42(b) and Ninth Circuit precedent. The Ninth Circuit remanded the matter to allow the district court to file those orders in proper form, then to reinstate the contempt convictions, and to reimpose punishment for Petitioner's contumacious behavior. The Ninth Circuit also ordered that, on remand, any sentence reimposed for the contempt convictions must not exceed eleven months. See United States v. Cohen, 510 F.3d 1114, 1119-20 (9th Cir. 2007).

Following remand, on May 27, 2008, this Court issued fifteen Orders of Contempt against Petitioner for delaying and disrupting the Court, and obstructing the Court in its administration of justice. (Docket Nos. 497-512.) On September 8, 2008, the Court filed an amended judgment imposing 151 months imprisonment for the conspiracy and tax fraud counts, with an additional eleven months imprisonment for the Contempt of Court citations to run consecutively, three years supervised release, and a fine of \$4,265,249.78. (Docket No. 544.)

On September 17, 2008, Petitioner filed another Notice of Appeal. (Court of Appeals Docket No. 08-10408.)

Petitioner filed the instant motion to vacate sentence pursuant to 28 U.S.C. § 2255 on July 14, 2009. In his motion, Petitioner asserts three grounds for relief. First, Petitioner asserts that his appellate counsel was ineffective for failing to argue that the Court wrongfully excluded the expert testimony regarding his mental disorder. Second, Petitioner argues that, in light of Indiana v. Edwards, 128 S. Ct 2379 (2008), the Court erred when it permitted him to represent himself because of his mental disorder. Lastly, Petitioner argues that the Amended Judgment is either illegal or the result of a clerical error

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<sup>1/</sup> On March 14, 2006, the Court issued an Amended Judgment, pursuant to Federal Rule of Criminal Procedure 36, in order to correct the sentence for clerical mistake. (Docket No. 396.)

1 because, although the Court stated that the total term of imprisonment for Petitioner's conspiracy and  
2 tax fraud convictions was 115 months, not 151 months.

3 ARGUMENT

4 PETITIONER'S MOTION SHOULD BE DISMISSED WITHOUT  
5 PREJUDICE BECAUSE IT IS PREMATURE

6 Petitioner's motion should be dismissed without prejudice because his criminal case is  
7 currently on appeal before the United States Court of Appeals for the Ninth Circuit. In case number  
8 08-10408, Petitioner filed a motion to extend the deadline for filing his opening brief which is now  
9 due on October 14, 2009. Consequently, his conviction is not yet final and his motion pursuant to 28  
10 U.S.C. § 2255 is premature. In addition, there are no extraordinary circumstances in this matter that  
11 would warrant allowing Petitioner to collaterally attack his convictions at the District Court level  
12 while his direct appeal is pending before the Court of Appeals.

13 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") typically requires  
14 federal prisoners to file a motion for habeas relief within one year from "the date on which the  
15 judgment of conviction becomes final." 28 U.S.C. § 2255. The Supreme Court has explained, "by  
16 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of  
17 appeal exhausted, and the time for certiorari finally elapsed or a petition for certiorari finally  
18 denied." Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987) (applying this definition to determine  
19 retroactivity of a criminal procedural rule). More importantly, the Ninth Circuit has instructed that  
20 "[a] district court *should not* entertain a habeas corpus petition while there is an appeal pending  
21 [before it] or in the Supreme Court." Feldman v. Henman, 815 F.2d 1318, 1320 (9th Cir. 1987)  
22 (citations omitted) (emphasis in Feldman); see also United States v. Pirro, 104 F.3d 297 (9th Cir.  
23 1997) (noting that judicial economy mitigates against entertaining a habeas corpus petition while an  
24 appeal is pending). The Ninth Circuit explained that the reason for this rule is that the habeas  
25 petition may be rendered unnecessary by the appellate disposition. Feldman, 815 F.2d at 1320.  
26 Decisions by the Ninth Circuit announced after AEDPA's enactment have reiterated this rule. See

1 United States v. Colvin, 204 F.3d 1221 (9th Cir. 2000) and United States v. LaFromboise, 427 F.3d  
2 680 (9th Cir. 2005).<sup>2/</sup>

3 Both United States v. Colvin and United States v. LaFromboise dealt with facts similar to  
4 those in the instant matter, and thus these two cases are particularly instructive. In Colvin, the  
5 defendant was convicted of four crimes. Colvin, 204 F.3d at 1222. On direct appeal, the Ninth  
6 Circuit affirmed three of the four convictions, affirmed the defendant's sentence because his base  
7 offense level remained unchanged, and remanded to the district court with directions to strike the  
8 conviction on the vacated count and to reduce the special assessment. Id. After receiving the  
9 appellate court's mandate, the district court decided that it did not have authority under the mandate  
10 to reconsider the defendant's sentence, and therefore, without further proceedings, it amended the  
11 defendant's judgment of conviction as directed. Id.

12 The defendant later filed a 2255 motion, and the government moved for dismissal on the  
13 ground that the motion was untimely. Id. Rejecting the defendant's argument that his judgment of  
14 conviction did not become final until the date on which the amended judgment was entered, the  
15 district court held that the judgment of conviction became final either when the mandate was  
16 received or when the date had passed for appealing the Ninth Circuit's decision. Id. Both of these  
17 dates were more than one year before the defendant filed his 2255 motion, and thus the district court  
18 deemed the motion untimely. Id.

19 On appeal, the Ninth Circuit reversed. Id. at 1226. The appellate court stated that the one-  
20 year statute of limitations for habeas corpus petitions runs from "the date on which the judgment of  
21 conviction becomes final," but noted that the statute does not define when the judgment of  
22 conviction becomes "final." Id. at 1223. The government argued that, because the defendant's  
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24  
25 <sup>2/</sup>It is unclear from the Ninth Circuit's jurisprudence whether this rule is jurisdictional or simply  
26 a prudential concern. Compare Feldman, 815 F.2d at 1323 (dismissing defendant's premature habeas  
27 petition because the district court lacked subject matter jurisdiction to entertain the petition) with Pirro,  
28 104 F.3d at 299 (noting that this rule was created "for reasons of judicial economy"); see also Rules  
Governing § 2255 Proceedings for the United States District Courts, Rule 5, Adv. Comm. Notes ("We  
are of the view that there is no jurisdictional bar to the District Court's entertaining a Section 2255  
motion during the pendency of a direct appeal but that the orderly administration of criminal law  
precludes considering such a motion absent extraordinary circumstances."). Under either understanding  
of this rule, petitioner's motion should be dismissed.

1 sentence and all but one of his convictions were affirmed, and his case was remanded only for the  
2 purposes of modifying the judgment, the district court's task was ministerial and the defendant could  
3 not have appealed the district court's entry of the amended judgment. Id. at 1224. Thus, the  
4 government contended the judgment of conviction became final, at the latest, when the time passed  
5 for appealing the Ninth Circuit's decision to the Supreme Court. Id. The appellate court rejected  
6 this argument and held that in cases where it has either partially or wholly reversed a defendant's  
7 conviction or sentence, or both, and expressly remanded to the district court, the judgment does not  
8 become final, and the one-year statute of limitations for 2255 petitions does not begin to run, until  
9 the district court has entered an amended judgment and the time for appealing that judgment has  
10 passed. Id. The appellate court remarked that one of the advantages of this "bright-line rule" is that  
11 it allows defendants to exhaust their appeals on direct review before bringing collateral attacks and is  
12 consistent with the Ninth Circuit's holding in Feldman, 815 F.2d at 1320-21, that a district court  
13 lacks authority to entertain a habeas corpus petition while direct review is pending. Id. at 1226.

14 Similarly, in LaFromboise, the Ninth Circuit vacated three of the defendant's five counts of  
15 conviction, and remanded the case for retrial of the vacated charges. LaFromboise, 427 F.3d at 682.  
16 Before retrial, the district court granted the government's motion to dismiss the three counts. Id.  
17 The district court, however, did not conduct a new sentencing hearing on the affirmed counts, nor  
18 did it enter an amended judgment reflecting the defendant's conviction and sentence in light of the  
19 dismissed counts. Id. Almost two years later, the defendant filed a 2255 petition, and the district  
20 court found the 2255 petition to be untimely. Id. On appeal, the Ninth Circuit reversed holding that  
21 the defendant's 2255 motion was in fact premature, rather than untimely, because, as the district  
22 court had not entered an amended judgment of conviction, the defendant's conviction had not yet  
23 become final. Id. at 683, 686. The Ninth Circuit specifically noted that, "LaFromboise's sentence  
24 on the counts of conviction, yet to be determined by the district court, will be subject to direct  
25 appeal. Once the new judgment is entered, he may or may not choose to appeal – but until direct  
26 appellate review is exhausted the district court may not entertain a motion for habeas relief." Id. at  
27 686 (internal citations omitted) (citing Feldman, 815 F.2d at 1320-21).

1 Based on the holdings of Feldman, Colvin and LaFromboise, the Court should dismiss the  
2 instant petition. As in Colvin and LaFromboise, the Ninth Circuit affirmed in part and reversed and  
3 remanded in part Petitioner's convictions. Per the holding of Colvin, in such situations the judgment  
4 does not become final until the district court enters an amended judgment and the time for appeal has  
5 expired. Additionally, just as the 2255 motion in LaFromboise was premature, Petitioner's 2255  
6 motion is premature, albeit for different reasons. On remand, the Court in the instant matter fully  
7 completed its responsibilities with respect to Petitioner's criminal convictions by issuing Orders of  
8 Contempt for each contempt conviction, resentencing Petitioner for those convictions, and entering  
9 an Amended Judgment on September 8, 2008. (See Docket No. 544.) While the defendant's  
10 conviction in LaFromboise did not become final because the district court never entered an amended  
11 judgment, in the instant case Petitioner's convictions are not final because he filed a direct appeal of  
12 the Court's September 8, 2008 amended judgment. As explained in LaFromboise, once a new  
13 judgment is entered, it is subject to direct appeal. In the instant case, Petitioner chose to exercise his  
14 appellate rights when he filed his Notice of Appeal on September 17, 2008. Because Petitioner  
15 exercised his appellate rights, his conviction is not final, and will not be final until the direct  
16 appellate review is exhausted. Accordingly, this Court lacks authority to entertain this habeas corpus  
17 petition and Petitioner's motion should be dismissed.

18 Dated: August 13, 2009

19  
20 Respectfully Submitted,  
21 GREGORY A. BROWER  
22 United States Attorney

23 s/ Lori A. Hendrickson  
24 CHRISTOPHER S. STRAUSS  
25 LORI A. HENDRICKSON  
26 Trial Attorneys  
27 U.S. Department of Justice  
28 Tax Division

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Civil Case No. 09-CV-01274

Criminal Case 2:04-CR-00119-KJD-LRL

Plaintiff,

vs.

CERTIFICATE OF SERVICE

IRWIN A. SCHIFF,

Defendant.

IT IS HEREBY CERTIFIED THAT:

I, LORI A. HENDRICKSON, am a citizen of the United States and am at least eighteen years of age. My business address is 333 Las Vegas Blvd., South, Suite 5000 Las Vegas, Nevada 89101.

I am not a party to the above-entitled action. I have caused service of GOVERNMENT'S MOTION TO DISMISS PETITIONER'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE on all parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 13, 2009.

s/ Lori A. Hendrickson  
LORI A. HENDRICKSON